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Nos. 315 and 454

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

POWER REACTOR DEVELOPMENT COMPANY, PETITIONER,

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, ET AL.

UNITED STATES OF AMERICA AND ATOMIC ENERGY COMMISSION, PETITIONER,

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, ET AL.

PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, ET AL. IN OPPOSITION

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Opinion Below

The Opinion of the court below (App. B p. 42)[1] is reported at 280 F.2d 645. Petitions for a rehearing en banc

[1] This reference is to Appendix B to the petition filed by the Power Reactor Development Company, hereinafter referred to as PRDC, No. 315, this Term.

were denied without opinion by Chief Judge Prettyman, and Circuit Judges Danaher, Fahy, Edgerton and Bazelon, with Circuit Judges Bastian and Miller dissenting.

Questions Presented

1. Whether the Atomic Energy Commission violated the Atomic Energy Act of 1954 by issuing a permit for construction of an atomic energy power reactor without finding that there was information sufficient to provide reasonable assurance that the reactor could be constructed and operated at the proposed site without undue risk to the health and safety of the public.[2]

2. Whether the Commission's findings regarding its assurance that the proposed reactor can be operated safely are ambiguous and, therefore, deficient.

3. Whether the Order of the Commission is a final order which adversely affects and aggrieves Respondents.

Statement

On January 6, 1956, PRDC filed an application for a license under Section 104 (b) of the Atomic Energy Act of 1954 to design, construct, and operate a developmental fast neutron breeder reactor at Lagoona Beach, Michigan,

[2] Questions 1 and 2 stated in the petitions of PRDC (No. 315, p. 2) and the Government (No. 454, p. 2) are not presented on the record, for the record does not show, or support the contentions, that the Commission (1) had followed its uniform or settled practice in issuing the provisional construction permit herein, or (2) had made any finding in accordance with its regulation that a facility of the general type proposed could be constructed and operated at the site selected without undue risk to the health and safety of the public, or (3) that the court below holds that the Commission lacks authority to issue reactor construction permits on the basis of findings called for by its regulation, or (4) that the Act precludes the approval of a site close to a populated area unless the Commission finds there are "compelling reasons" for such location.

and also requested issuance of a construction permit for such a reactor (Tr. 5117, 5118, 5119, 5166).[3]

On June 6, 1956, the Commission's Advisory Committee on Reactor Safeguards submitted a report to the General Manager of the Commission summarizing its investigation of this proposed reactor, and concluded, in part, that "There is insufficient information available at this time to give assurance that the PRDC reactor can be operated at the site without public hazard." (Tr. 6368).

On August 4, 1956, the Commission granted a provisional construction permit to PRDC to build its proposed reactor. (Tr. 6293, 6294). The permit recognized that, "There are identified areas of uncertainty regarding the hazard potential of fast neutron breeder reactors that must be investigated and resolved. From the current state of the technology applicable to such reactors it can reasonably be inferred that there may be other areas of uncertainty not yet identified and requiring investigation and resolution." (Tr. 6292, 6293).

On or about August 31, 1956, Respondents filed petitions for intervention before the Commission, alleging, inter alia, that the construction permit granted to PRDC was issued in violation of the Act, would imperil the health and lives of thousands of Respondents' members, would imperil the homes and property of those members, as well as the property of the Respondents, would imperil the plants in which they work and earn their livelihood, would depress the value of their real estate, would influence industry to leave the areas which might be affected by an atomic castrophe, and would imperil collective bargaining agreements with employers in the area and seriously im-

[3] "Tr." refers to the original pagination of the certified transcript which is indicated in bold face in the printed Joint Appendix in the Court of Appeals.

pair their value. It was alleged, furthermore, that, by permitting the expenditure of $45 million for construction of a reactor, the issuance of the construction permit will induce the issuance of an operating permit without proper consideration of and regard for the health and safety of the Respondents and other members of the public (Tr. 6301-6304; 6314, 6315). *Neither PRDC nor the Commission challenged or denied the allegations of the Respondents' petitions for intervention.*

On October 8, 1956, the Commission granted Respondents leave to intervene, and directed that a hearing be held on issues *specified* by the Commission. The issue relating to safety was specified as follows:

> "A(1) Whether there is information sufficient to provide reasonable assurance that a utilization facility of the general type proposed by PRDC can be constructed and operated at the Lagoona Beach site without undue risk to the health and safety of the public." (Tr. 6359)

During the course of an extensive hearing that began on January 8, 1957, it was shown that the greatest potential hazard in a nuclear reactor lies in the possibility that the tremendous accumulation of radioactive fission products imprisoned in the fuel might somehow be released into the atmosphere and be distributed by wind and contaminate inhabited areas. A chain of events which could lead to a release of fission products into the atmosphere may be initiated either by a nuclear runaway or a loss of coolant, and the initial concern from a safety point of view must be, so far as is humanly possible, that such a nuclear runaway or loss of coolant cannot occur. (Tr. 4267, 4268.) These fission products are more toxic per unit of weight than any other industrially known materials by a factor of a million to a billion (Tr. 3001). An official Commission

report indicates that the possible damage from a major accident in a large nuclear power plant may run up to $7 billion, killing and maiming many thousands of people and laying waste scores of thousands of square miles of land (Tr. 4855-4892). More than two million people live within a radius of 30 miles of the site of the PRDC reactor (Tr. 7020). Considerable evidence related to the extent to which the PRDC design has solved, if at all, these serious questions and whether it was safe to build such a reactor in a heavily populated area.

On December 10, 1958, the Commission issued its initial decision affirming the provisional construction permit it had issued on August 4, 1956, and continuing it in effect with certain modifications and additions. Respondents filed exceptions thereto, including exceptions to the findings concerning safety of the proposed reactor site (Tr. 6911, 6914).

A. Decision of the Commission

On May 26, 1959, the Commission issued its Opinion and Final Decision. All exceptions taken by the Respondents were dismissed (Tr. 6937).

The principal finding of the Commission on the safety issue is that there is reasonable assurance in the record, *for the purposes of the provisional construction permit*, that a utilization facility of the general type proposed in the PRDC application and amendments thereto can be constructed and operated at the Lagoona Beach site without undue risk to the health and safety of the public. (Finding No. 22, Tr. 7020.) The Commission made no finding on the issue specified by the Commission itself, namely, whether there is sufficient information to provide reasonable assurance that a utilization facility of the general type proposed by PRDC can be constructed and operated at the Lagoona Beach site without undue risk to the health and

safety of the public. The Commission emphasized the limited nature of its finding by various statements, for example, "It has not been positively established that a fast breeder reactor of the general type and power level proposed by Applicant can be *operated* without a credible possibility of releasing significant quantities of fission products to the environment." Repeatedly the Commission emphasized that its findings on safety were limited to "the purposes of the provisional construction permit." (Tr. 6983, 6987, 7020, 7022.)

The Commission gave considerable attention to the question of the suitability of the site selected for the PRDC reactor. It arrived at the equivocal conclusion, among others, "Although the data (as to site suitability) are not yet complete or conclusive, the record gives reasonable assurance that safe operation of the reactor will be as likely in that location *as in any other location*." (Emphasis added) (Tr. 6985)

The Order of the Commission modified the original permit by establishing a procedure for continuing review of the safety characteristics of the PRDC plant.

Nowhere in its decision did the Commission state that the findings made in this case were similar to the findings made in any other construction permits issued by the Commission, or that it was following customary practice in making the kind of findings it did in this case.

B. Decision of the Court of Appeals

Standing to appeal. At the outset the court considered the contention of Petitioners that Respondents did not have standing to appeal because the Commission's order was not a final order, and the Respondents were not aggrieved by it. The court held that the Commission's order is a final order, and that the Respondents are ag-

grieved by it, and because it threatens them with economic injury Respondents have the requisite standing to appeal and to raise any relevant question of law in respect of the order, citing *Federal Communication Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 477.

The Court recognized that the Commission has declared that a license authorizing operation of the facility will not be issued unless PRDC has submitted to the Commission information providing reasonable assurance that the health and safety of the public will not be endangered by operation of the facility in accordance with specified procedures. The court points out, however, that the Commission stated, "There is reasonable assurance that theoretical and experimental programs under way will develop sufficient data to justify the issuance of an operating license, and that the results of these programs will be available prior to the time it is necessary for the Commission to rule on the operating aspect of the PRDC license Application." On the basis of this and other statements the court found that "it is plainly probable, in a high degree, that if the construction permit stands PRDC will get an operating license and will operate. We think petitioners are therefore aggrieved by the issuance of the permit." (App. B 45)

Safety Findings Required by the Atomic Energy Act. The court held that when the Commission authorizes construction of a reactor it must make a finding, as of the time the construction permit is issued, that the Commission has reasonable assurance that the reactor may be constructed and operated at the proposed site without undue risk to the health and safety of the public. After reviewing pertinent sections of the Act, particularly Sections 182 and 185, and significant portions of its legislative history, the court held that when the Commission issues a construction permit, it must, in accordance with Section 182,

'find that the utilization or production of special nuclear material . . . will provide adequate protection for the health and safety of the public,'' or in the Commission's phrase, that the facility can be ''operated at the location proposed without undue risk to the health and safety of the public.'' (App. B 47)

The Commission's Safety Findings. The court held that the Commission's findings regarding safety of operation are not sufficient. It pointed out that the Initial Decision dated December 10, 1958, contains this unqualified finding: ''22. The Commission finds reasonable assurance in the record that a utilization facility of the general type proposed in the PRDC application and amendments thereto can be constructed and will be able to be operated at the location proposed without undue risk to the health and safety of the public.'' (Tr. 6881). But in the Opinion and Final Decision which accompanied its order of May 26, 1959, the Commission qualified that finding as follows: ''22. The Commission finds reasonable assurance in the record, *for the purpose of this provisional construction permit*, that a utilization facility of the general type proposed in the PRDC application and amendments thereto can be constructed and operated at the location without undue risk to the health and safety of the public.'' (emphasis added) (Tr. 7020)

The court held that this is not a finding that a facility can be operated at the location selected without undue risk. The court quoted other statements of the Commission which confirmed the conclusion that it no longer found, as it had found in December, reasonable assurance that a facility can be operated at the location without undue risk (App. B 49).

The court then pointed out that the Commission also used other expressions which might seem to indicate a

positive opinion regarding the safety of operations. (App. B 50, 51) The court held, therefore, that the Commission's findings regarding safety of operation were ambiguous. The court held that the Commission should make the basis of its action reasonably clear, that it did not do so in this case, and that the court must know what a decision means before it can say whether or not it is right or wrong, citing *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654; *Radio Station KFH Co.* v. *FCC*, 101 U.S. App. D.C. 164, 166, 247 F.2d 570, 572; and *Pacific Far East Line Inc.* v. *Federal Maritime Board*, 275 F.2d 184, 187.

The court also found that the Commission's safety findings were deficient with respect to the safety of the site on which the reactor is being built. The court pointed out that the Commission after reviewing the evidence concerning the suitability of the site declared, "Although the data of these types is not yet complete or conclusive the record gives reasonable assurance that safe operation of the reactor will be as likely in that location as in any other location." The court declared that this finding was clearly insufficient in view of the absence of a finding that the reactor could be operated without undue risk to the health and safety of the public (App. B 52).

The court stated, in the course of its site discussion, that it was clear from the Congressional concern for safety that Congress intended no reactor should, without compelling reasons, be located where it will expose so large a population as is present in this situation to the possibility of a nuclear disaster, and that the Commission did not find compelling reasons for doing so in this case. However, *it did not hold that the absence of such finding was the reason for the insufficiency of the Commission's finding on site suitability.*

The court concluded that, because the safety findings were insufficient, it must set aside the Commission's grant of a construction permit, and remand the case for such further proceedings consistent with the opinion of the court as the Commission may determine.

The court did not consider other points raised by the Respondents as grounds for setting aside the Commission's Order (App. B 45).

The dissenting judge was of the opinion that the Respondents did not have standing to sue because the order of the Commission was not final. He also commented that he could not believe, as the majority of the court appeared to believe, that the members of the Commission would permit an operation dangerous to the public because $40 or $50 million is invested in brick, mortar, or steel, by men who knew from the outset they were engaged in a scientific gamble.

Argument

The decision of the court below does not present an important question of federal law which has not been, but should be, settled by this Court. Furthermore, not only is that decision not contrary to the explicit policy of the Atomic Energy Act of 1954, but clearly underscores and supports that policy. It does not invalidate any Commission regulation, nor does it affect any uniform practice followed by the Commission with regard to the issuance of construction permits for atomic reactors. It does not in any respect frustrate the administration of the regulatory provisions of the Atomic Energy Act of 1954, nor in any way impede progress in the application of nuclear energy to peacetime purposes in accordance with the purposes and intent of that Act. The decision below

is based on the manner in which the Commission handled this particular case, and will not have general significance. Consequently, it is not appropriate for review on certiorari by this Court.

I

THE ATOMIC ENERGY COMMISSION VIOLATED THE ATOMIC ENERGY ACT OF 1954 BY ISSUING A PERMIT FOR CONSTRUCTION OF AN ATOMIC ENERGY POWER REACTOR WITHOUT FINDING THAT THERE WAS INFORMATION SUFFICIENT TO PROVIDE REASONABLE ASSURANCE THAT THE REACTOR COULD BE CONSTRUCTED AND OPERATED AT THE PROPOSED SITE WITHOUT UNDUE RISK TO THE HEALTH AND SAFETY OF THE PUBLIC.

Petitioners assert that the court below holds that the Commission may not authorize construction of a reactor without first making the same final, definitive and complete findings on the safety of reactor design and operation as are required for the issuance of a license to operate. The court does not so hold.

The issue decided by the court was specifically framed by the Commission itself—and then ignored in the latter's decision. The Commission declared in its Final Decision that "The principal factual issue in this proceeding is whether there is information sufficient to provide a reasonable assurance that a utilization facility of the general type proposed in the PRDC application can be constructed and operated at the location proposed therein without undue risk to the health and safety of the public." (App. B 50; Tr. 6971) At the very outset of the case the Commission itself specified that issue. (Tr. 6359)

What the court correctly held to be fatally defective was the Commission's failure to make a finding, at least a reasonably clear finding, as to *any* assurance, at the time of

the issuance of the construction permit, that the reactor can be operated at the proposed site without undue risk to the health and safety of the public.

The Petitioners assert that the Commission has consistently followed the same policy since the commencement of the reactor licensing program in 1955 as it did in this matter. This is contrary to fact. *The Commission has never failed, in acting on any other application for a construction permit for a power reactor or research and development reactor, either before or after the PRDC permit was issued, to make the finding on safety which the court has held to be necessary.* See Appendix hereto, previously presented to the lower court, listing all construction permits for power reactors, and research and development reactors, issued up to July 1960. The Petitioners have not challenged a single item in this Appendix. Nevertheless, Petitioners assert that every one of the nine power reactors thus far licensed by the Commission has been issued a provisional construction permit with similar findings of reasonable assurance of safety as in this case. That is contrary to the facts, as reference to the decisions in these cases will show. In every one of them, other than the PRDC reactor, the Commission made the kind of finding of reasonable assurance of safety of *operation* which the court deemed essential.

Petitioners lay great weight on a purported distinction between a reactor "of the general type proposed," as used in the Commission's regulation, and a specific reactor for which an applicant seeks a permit. This distinction is specious. Neither the quoted phrase, nor anything similar to it, appears in the Act. The Commission itself made no such distinction in its examination of the PRDC application. The evidence presented on safety related to the specific reactor proposed. The findings of the Commission relating to safety deal with the problems presented

by the proposed PRDC reactor, not fast breeder reactors in general. The court below correctly ignored the distinction insisted upon by Petitioners.

The Commission has clearly not followed its own applicable regulation. Section 50.35 of the Commission's regulations provides that a construction permit may be issued, if all the necessary technical information is not then available, only

". . . if the Commission is satisfied that it has information sufficient to provide reasonable assurance that a facility of the general type proposed can be constructed and operated at the proposed location without undue risk to the health and safety of the public . . ."

That finding was not made. Petitioners assert that the court has invalidated the Commission regulation under which the construction permit in this case was issued. There is not a word in this decision to that effect, nor may it be reasonably so construed. The court did reject the Commission's rationalization for failing to make the finding which its own regulation requires.

On December 10, 1958, in its Initial Decision, the Commission made an unqualified finding of reasonable assurance of safety of operation (App. B 48; Tr. 6881). On May 20, 1959, in its Final Decision, it modified that finding with the proviso that it was "for the purpose of a provisional construction permit." This nullified, in effect, any assurance as to safety of operation, an assurance called for without any proviso (1) by the Commission's specification of the issue for this case; (2) by the Commission's regulation 50.35, and (3) by the Act, particularly Section 182 which requires, before either a construction permit or an operating license is issued, that the Commission "find that the *utilization or production* of special nuclear material . . . *will* provide adequate protection to the health and safety of the public (Emphasis added) (Pet. No. 315, p. 60).

Against the background of the Commission's consistent practice of making an unqualified finding of reasonable assurance of operating safety at the time it issues a construction permit, the Commission's change of position between its Initial Decision and Final Decision is of decisive significance. *Petitioners make no attempt to deal with it.*

Petitioners seek to defend the Commission's action by contending (1) the Act does not require *any* specific findings at the construction permit stage; (2) a requirement of a definite safety finding at the construction permit stage would, at best, considerably delay private development of atomic energy; (3) nothing in the Act or its legislative history requires or justifies the court's invalidation of the Commission's carefully devised regulating scheme; and (4) the court below overstepped the bounds of judicial review.

There is no merit in any of these contentions.

The court below carefully examined the applicable statutory provisions and came to the inescapable conclusion that the Act does require, at the construction permit stage, a finding the reactor will operate safely. Section 182 specifically makes this requirement for operating licenses. Section 185 equates construction permits with licenses for all purposes other than those specified in that Section, none of which relates to findings at the time the construction permit is issued. If there is any doubt on this score, it is completely removed by the legislative history on this point, quoted at length by the court, which includes a positive affirmation by the chairman of the Committee handling the legislation that "the revised sections on judicial review and on hearings *and on revised section 182 on license applications all apply directly to construction permits.*" (App. B pp. 46, 47.)

PRDC insists, but is apparently not supported in this by the Government, that the legislative history demon-

strates that Congress deliberately rejected the principle that the basic safety determination should be made at the time the construction permit is issued. There is nothing whatever in the legislative history which supports this contention, and PRDC has cited none. On the contrary, during the hearings before the Joint Committee on Atomic Energy on the bill which became the Act, the Chairman specifically assured a witness that if a reactor was constructed in accordance with the requirements of the construction permit, an operating license would be granted.[4] The extent of the Commission's discretion with respect to denial of an operating license is therefore quite limited. Petitioners interpret this colloquy as applying only to hearings and judicial review but fail to cite a single reference which controverts the language quoted above. PRDC recognizes this in making the further argument that the court below erred in requiring a "definitive" finding of safety of operation, as distinguished from a finding in the words of the Commission's regulation Section 50.35. But the court clearly indicated that it would have approved a finding made in these words, as shown by its favorable reference to the Initial Decision of December 10, 1958, which did use those words (App. B. p. 48). However, the Commission deliberately chose not to use that finding in its Final Decision.

Petitioners' contention that the court's holding will delay and interfere with the development of atomic energy is completely untenable, particularly in light of the fact that all other construction permits issued by the Commission for power reactors and research and development reactors do contain the finding deemed essential by the court. This conduct establishes, far more persuasively than the decision of the Commission in this case, how the

[4] Legislative History of Atomic Energy Act of 1954, Vol. II, pp. 1752, 1753.

Commission in fact interpreted the Act. It follows that PRDC's contention that the court invalidated the "carefully devised regulatory scheme" established by the Commission is wholly unwarranted. The court merely invalidated the *Commission's* effort to *bypass* that scheme *in this case*. To permit that would be tantamount to concluding that the Commission had unbridled discretion. But Congress will not be deemed to have delegated unbridled discretion to an agency—even when it placed no express limit on the discretion allowed. *Kent* v. *Dulles*, 375 U.S. 116. There can be no doubt that regulations consistent with the statutes under which they are adopted are binding on the agency. *Accardi* v. *Shaughnessy*, 347 U.S. 260; *Vitarelli* v. *Seaton*, 359 U.S. 535; *Service* v. *Dulles*, 354 U.S. 363.

It is equally free from doubt that an agency's regulations must be consistent with the statute under which they are promulgated, otherwise they are invalid, *Kent* v. *Dulles*, *supra*; *Addison* v. *Holly-Hill Co.*, 322 U.S. 607; *Manhattan General Equipment Co.* v. *C.I.R.*, 297 U.S 129, 134.

Finally, Petitioners assert that the decision of the Commission is in accord with its uniform and settled practice over a period of years, which was repeatedly brought to the attention of Congress but not dealt with in subsequent amendments. This statement is not in accord with the facts. As shown above, the Commission's decision does not follow the uniform practice of the Commission. Furthermore, the references cited in the Commission's decision (Tr. 6958-65) to show that it had apprised Congress of its regulations, in fact show that at no point did Commission representatives say that a construction permit would be issued in the absence of assurance, at the time of issuance of the permit, that the reactor could be constructed and operated without undue risk to the health

and safety of the public. At the time of that testimony the regulations had not yet been adopted or applied.

Significantly, when the Commission went to Congress for an appropriation to carry out its research obligations in connection with this reactor, a substantial conflict developed both in the Joint Committee on Atomic Energy and on the floor of Congress. The money requested by the Commission to carry out its contractual commitments was denied, and specific reference was made to the objections which had been made to the issuance of the permit.[5]

More recently, the Commission advised Congress that, in fact, *its current regulations do require a finding at the time a construction permit is issued that there is reasonable assurance of safe operation.* However, the Commission now believes this requirement too onerous and therefore proposes to amend its regulations to omit it.[6] The proposed amended regulation was published in 25 Fed. Reg. 1224.

The fact that its administration of the Act persuaded the Commission that its previous interpretation is not now practicable does not validate a proposal that is not authorized by the Act. "Administration may reveal gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose should have been made more comprehensive." *Addison* v. *Holly Hill Fruit Products, Inc.* 322 U.S. 607, 617.

Safety of the Site. Petitioners assert that the court

[5] Hearings before Senate Committee on Appropriations, 85th Congress, First Session, Atomic Energy Commission Appropriations Bill, H.R. 9379, August 21, 1957, p. 10. Conference Report on H.R. 9379, August 23, 1957, p. 2.

[6] Hearings on Development, Growth and State of the Atomic Energy Industry before Joint Committee on Atomic Energy, 86th Congress, Second Session, pp. 103, 104, 105, February 17, 1960.

below required "compelling reasons" to support the location of reactors near population centers, and thereby usurped the Commission's function and frustrated its administration of the Act. This is a distortion of the court's opinion.

After pointing out the horrendous consequences of an accidental release of fission products from a nuclear reactor, the court quoted the Commission finding that: ". . . Although the data (relating to site suitability) are not yet complete or conclusive, the record gives reasonable assurance that *safe operation of the reactor will be as likely in that location as in any other location.*" (Emphasis added) (App. B 52).

The court held this finding "clearly insufficient". It also stated: "*We need not consider* whether even the most compelling reasons for preferring this location could support a finding that the reactor could be operated at this location without 'undue' risk, or with 'adquate' protection, to the health and safety of the public." (Emphasis added) (App. B 52)

In other words, there is no need to consider whether there are compelling reasons for the present location of this reactor, because the Commission failed to make the safety findings which the Act requires for all reactors; even the *most compelling reasons* for selecting a given location *cannot substitute for the necessary safety findings.*

Petitioners have completely misconstrued the statements of the court below relating to the site of the PRDC reactor. There is no basis whatever for the contention that the court considered the population distribution around the site to be a disqualifying factor in any degree, let alone "the single disqualifying factor" as PRDC asserts (Pet. No. 315, p. 27). Nor is there any basis for the assertion that the decision directs the Commission not to locate any

power reactor in the absence of compelling reasons in an area of population directly comparable to that found here.

While the Court did declare that Congress intended no reactor should, without compelling reasons, be located where it will expose so large a population (over 2 million) to the possibility of a nuclear disaster, *this was not a holding, and was not a factor in the decision.* While there is legislative history supporting the court's statement, this does not enter into the court's interpretation of the Act or its determination of the sufficiency of the Commission's safety findings. The court made this abundantly clear when it added that the most compelling reasons could not make up for the absence of a finding that the reactor could be operated at this location without undue risk to the health and safety of the public.

Finally, as shown above, the Commission did make, with respect to all construction permits for power reactors issued under the Act, with the exception of the PRDC reactor, a specific finding that there was reasonable assurance that the reactor could be constructed and operated *at the proposed location* without undue risk to the health and safety of the public.

Respondents submit that there is nothing novel in the principles which the court has applied to the interpretation of the Act, that there is no conflict between this decision and other cases in this Circuit on the application of those principles, and that the decision does not create any hindrance to the development of the atomic energy industry.

II

THE COMMISSION'S FINDINGS REGARDING THE SAFETY OF OPERATION OF THE PROPOSED REACTOR ARE AMBIGUOUS AND, THEREFORE, DEFICIENT.

The court below carefully reviewed the findings of the Commission with respect to the safety of operation of the proposed reactor and found considerable confusion. It found that various statements on the matter of safety of operation were not consistent with one another. On the one hand, the Commission's principal finding was qualified by the assertion that it found reasonable assurance of operating safety only for the purposes of this provisional construction permit. (App. B p. 48). The court cited a number of other statements made by the Commission confirming the impression that it no longer found, as it had found in December 1958, reasonable assurance that a reactor can be operated at the proposed location without undue risk. (App. B 49-50).

The court pointed out, on the other hand, that the Commission also made several statements which might seem to indicate a positive opinion regarding safety of operation. (App. B 50-51).

The court concluded that the findings regarding safety of operation are ambiguous. In its opinion, the nature, size and location of the project required that the findings be uncommonly free from ambiguity. The court held, consequently, that since the basis of the Commission's action was not reasonably clear, the safety findings are deficient, citing *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654; *Pacific Far East Line, Inc.* v. *Federal Maritime Board*, 275 F.2d 184, 187; and *Radio Station KFH Co.* v. *Federal Communications Commission*, 101 U.S. App. D.C. 164, 166; 247 F.2d 570, 572. See also

Eastern Central Motor Carriers Association v. *United States*, 321 U.S. 194, 211; *United States* v. *Chicago, Milwaukee, St. Paul Railroad Company*, 294 U.S. 499, 510.

This principle is well established and has been repeatedly applied by this Court, as well as by the court below, and there are no conflicting decisions among the various circuits.

Significantly, the PRDC petition for a writ is silent on this aspect of the court's decision, and fails to mention or consider any of the authorities on which it rests.

The Government does mention this holding of the court and asserts that it is erroneous, but does not argue the point in its petition (No. 454, fn. p. 2[20-21).

Inasmuch as the ambiguity pointed out by the court is sufficient justification in itself for remanding this case to the Commission, the failure of the Petitioners to argue the point requires dismissal of their petitions herein.

III

THE ORDER OF THE COMMISSION IS A FINAL ORDER WHICH ADVERSELY AFFECTS AND AGGRIEVES RESPONDENTS.

Section 189(a) of the Act provides that "In any proceeding under this Act for the granting . . . of any license or construction permit, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding and shall admit any such person as a party to such proceeding."

Section 189(b) states that "Any final order entered in *any proceeding of the kind* specified in subsection (a) of this section shall be subject to judicial review . . ." (Emphasis added)

The Act clearly provides, therefore, that orders granting construction permits may be final orders. So much PRDC concedes. (Pet. No. 315, p. 34)

Petitioners contend, however, that because further hearing is required before an operating permit will be granted, the order in this case is not final. The Act contemplates, however, that *every* construction permit shall be conditional, and subject to a hearing before an operating permit is issued. Section 185 of the Act provides that after construction of any facility is completed, a license to operate may be granted only upon a finding that the facility has been constructed and will operate in conformity with the application, the law, and the regulations of the Commission, and in the absence of any good cause being shown why the granting of a license would not be in accordance with the provisions of the Act. (App. B 62)

These conditions inhere in the grant of every construction permit. Since the Act provides that orders concerning construction permits may be subject to judicial review, it was certainly not contemplated that review should be denied because a grant is conditional. The legislative history is clear that the issuance of construction permits should be subject to judicial review.[7] It is settled, of course, that the form of an order does not determine its reviewability. *Federal Communications Commission* v. *Columbia Broadcasting System*, 316 U.S. 407.

There are a number of unacceptable conditions in the Commission's Final Decision, Order, and Permit, including the underlying condition that construction would proceed without essential findings concerning health and safety, but with a finding that the site selected is suitable. (Finding 32, Tr. 7023) No change is possible now with respect to the site. The choice is final.

In any event, the court below pointed out that the Commission did, in fact, make it clear that an operating license will be issued when construction is completed, in the state-

[7] Legislative History of Atomic Energy Act of 1954, Vol. III, p. 3759.

ment that "There is reasonable assurance that theoretical and experimental programs under way will develop sufficient data to justify the issuance of an operating license, and that the results of these programs will be available prior to the time it is necessary for the Commission to rule on the operating aspect of the PRDC license Application." (App. B 45)

The validity of the court's conclusion becomes particularly apparent in light of the fact that *there is not a single instance on record of the Commission's refusing to issue an operating license, for any kind of reactor, after construction has been completed.* Construction has been completed on 19 reactors, and operating licenses have been issued for all of them.

PRDC appears to take the position that Respondents would have no standing to sue unless they were affected by the *actual operation of the reactor.* (Pet. No. 315, p. 34, fn. 23) In other words, the Commission's grant of a license to operate would not be appealable, and Respondents would have no remedy until a disaster occurred! Such an interpretation makes a mockery of the right of right of judicial review. Congress could never have intended such an absurdity. The Government does not take this position.

The adverse effect on Respondents of the Commission's action has already been established. In their petitions for intervention before the Commission, Respondents alleged, inter alia, that the action of the Commission would imperil the health and lives of thousands of Respondents' members, would imperil their homes and property, would imperil the plants in which they work and earn their livelihood, would depress the value of their real estate, and would influence their employers to leave the areas which might be affected by an atomic catastrophe.

These allegations were not controverted by PRDC or

by the Commission, and the Commission so stated (Tr. 6362). Having failed to take timely issue on the matter of Respondent's interest, the Petitioner's present contentions in regard thereto must be rejected. *National Coal Association* v. *Federal Power Commission*, 89 App. D.C. 135, 137; 191 F.2d 462, 466.

In a patent effort to confuse the issues, PRDC asserts that the essence of the court's holding on *aggrievement* is found in the tenet that the issuance of the construction permit will result in pressure to approve an operating license because of the great sums of money invested. This is literally an argument *in extremis*, since it is obvious that the opinion of the court below, in regard to Respondents' standing to sue, makes no reference whatever to this so-called "tenet". (App. B 43-45). The Government does not support this position.

The court relied on *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 477. It is noteworthy that Petitioners make no effort to distinguish this landmark decision; they ignore it. That case, like the present case, involved the issuance of a construction permit. Under the law as it existed at that time, the applicant, after completing construction of a radio station, returned to the Federal Communications Commission for an operating license, and was granted such license only if the conditions of the permit were complied with and no intervening circumstances had arisen that justified denial of an operating license. The fact that the Commission might refuse to grant the operating license did not render the aggrievement speculative so as to deprive the appellant of his standing to sue.

PRDC asserts, but is not supported in this by the Government, that "the only interest which the respondents here are entitled to protect" is the safety of their members from *unreasonable* hazard from the operation of the

reactor. This is flatly contrary to the holding of *Sanders*. The court there declared, p. 476:

> ". . . It does not follow that, because the licensee of a station cannot resist the grant of a license to another, on the ground that the resulting competition may work economic injury to him, he has no standing to appeal from an order of the Commission granting the application . . .
>
> "Section 402(b) of the Act provides for an appeal to the Court of Appeals of the District of Columbia (1) by an applicant for a license or permit, or (2) by any other person aggrieved or whose interests are adversely affected by a decision of the Commission granting or refusing any such application . . .
>
> "Congress had some purpose in enacting Section 402(b)(2). It may have been of the opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal.
>
> "We hold, therefore, that the respondent had the requisite standing to appeal and to raise, in the court below, any relevant question of law in respect to the order for the Commission."

The reasoning of *Sanders* was relied upon by this Court in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 198. See also *Ashbacker Radio Co.* v. *Federal Communications Commission*, 326 U.S. 327, 331, 332; *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 14; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 151, 156.

The cited cases are dispositive of the issue of the Respondents' standing to sue. None of this Court's decisions cited by petitioners modify or qualify the decisions cited above.

There is no conflict between the decision of the court below in this case, and other decisions of that court. PRDC discusses the authorities on aggrievement without regard to their pertinence to the statute involved in this case. It ignores the fact that Section 10 (a) of the Administrative Procedures Act, as amended, 60 Stat. 245, 5 USC Section 1009, provides that any person adversely affected or aggrieved by agency action "within the meaning of any relevant statute" shall be entitled to judicial review of such action. The meaning and purpose of the relevant statutes involved determine the scope of the right of appeal. *U. S.* v. *Public Utilities Commission, etc.*, 80 App. D.C. 227, 230; 151 F.2d 609, 612; *National Coal Association* v. *Federal Power Commission*, 89 App. D.C. 135, 137; 191 F.2d 462, 466; *Pollak* v. *Public Utilities Commission*, 89 App. D.C. 94, 97, 191 F.2d 450, 453, 456. *Elm City Broadcasting Co.* v. *F.C.C.*, 235 F.2d 811, 815; 98 App. D.C. 314, 318.

Other circuits have taken the same position: *Reade* v. *Ewing*, 205 F.2d 630, 632 (C.A. 2); *Grace Line* v. *Panama Canal Co.*, 243 F. 2d 844, 856 (C.A. 2); *Land O'Lakes Creamery* v. *McNutt*, 132 F.2d 653, 658 (C.A. 8).

PRDC seeks, but is not supported in this by the Government, to draw a distinction between the panel of the court below that decided this case, and other panels of the same court, with respect to the issue of standing to sue. It should be noted that the decision of the court below was considered by the court en banc on a petition for rehearing, and rehearing was denied. Chief Judge Prettyman and Judge Danaher, who voted with the majority in denying the petitions for rehearing, participated in the other cases

in this circuit cited by PRDC for the proposition that there is conflict within the circuit.

None of the cases cited by Petitioners, in support of their contention that the order of the Commission is not a final order which aggrieves the Respondent, is pertinent. None of them deals with a set of circumstances remotely similar to the situation in the case at bar.

Conclusion

It is submitted that, in the light of the principles established by this Court, the statute involved, and particular facts of this case, there is no conflict between the decision of the court below and the decisions of this Court and those of other circuits. The decision does not in any respect frustrate the administration of the regulatory provisions of the Atomic Energy Act of 1954, nor in any way impede progress in the application of nuclear energy to peaceful purposes in accordance with the purposes and intent of the Act. Finally, the decision does not present any important question of federal law which has not been, but should be, settled by this Court.

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1960.

APPENDIX

Construction Permits Issued by Atomic Energy Commission

I. *Power Reactors*

CPPR-1	Consolidated Edison Co.	21 F.R. 3084—	5/ 9/5
CPPR-2	Commonwealth Edison Co.	21 F.R. 3085—	5/ 9/5
CPPR-3	General Electric Company	21 F.R. 3395—	5/22/5
CPPR-4	*Power Reactor Development Co.*	21 F.R. 5974—	8/ 9/5
CPPR-5	Yankee Atomic Electric Co. [1]	22 F.R. 7188	
		22 F.R. 9237—	11/19/5
CPPR-6	Saxton Nuclear Experimental Corp.	24 F.R. 9244	
	Associates, Inc.	25 F.R. 1471 —	2/18/6
CPPR-7	Carolinas Virginia Nuclear Power	25 F.R. 522	
	Associates, Inc.	25 F.R. 4206—	5/11/6
CPPR-8	Northern States Power Company	25 F.R. 254	
		25 F.R. 4484—	5/20/6
CPPR-9	Consumers Power Company	25 F.R. 1699	
		25 F.R. 5002—	6/ 7/6

II. *Research and Development Reactors*

CPRR-1	University of Michigan [2]		2/17/5
CPRR-2	Armour Research Foundation [2]		6/12/5
CPRR-3	U.S. Naval Research Lab. [2]		4/29/5
CPRR-4	Battelle Memorial Institute [2]		5/ 4/5
CPRR-5	Massachusetts Institute of Technology [2]		5/ 7/5
CPRR-6	Aerojet-General Nucleonics	21 F.R. 6520—	8/29/5
CPRR-7	Industrial Reactor Lab. Inc.	22 F.R. 618—	1/30/5
CPRR-8	Westinghouse Electric Corp.	22 F.R. 152	
		22 F.R. 4891—	7/11/5
CPRR-9	Aerojet-General Nucleonics	22 F.R. 742	
		22 F.R. 1321—	3/ 2/5
CPRR-10	North Carolina State College	22 F.R. 1052	
		22 F.R. 1616—	3/13/5
CPRR-11	Curtiss Wright Corp.	22 F.R. 3902	
		22 F.R. 4516—	6/27/5
CPRR-12	Aerojet-General Nucleonics	22 F.R. 4327	
		22 F.R. 4919—	7/12/5
CPRR-13	Aerojet-General Corp. & Aerojet Gen. Nucl.	22 F.R. 4329	
		22 F.R. 4919—	7/12/5
CPRR-14	North American Aviation, Inc.	22 F.R. 5648	
		22 F.R. 6367—	8/ 8/5

[1] Where there are two F. R. citations for an application, the first contains the notice of intention to issue a construction permit, generally including all findings of fact, and the second contains notice of issuance of permit. Dates given are dates of publication of notice of issuance of permit.

[2] Not published in Federal Register. Date given is date of issuance of permit.

CPRR-15	Univer[illegible] of Virginia	22 F.R. 6978
CPRR-16	Ordnance Materials Research Office	22 F.R. 7494— 9/19/57 22 F.R. 7410
CPRR-17	Daystrom, Inc.	22 F.R. 8020—10/ 9/57 22 F.R. 7667
CPRR-18	Union Carbide Corp.	22 F.R. 8424—10/25/57 22 F.R. 7916
CPRR-19	General Electric Co.	22 F.R. 9005—11/ 9/57 22 F.R. 8019
CPRR-20	American Radiator and Standard Sanitary Corp.	22 F.R. 8855—11/ 2/57 22 F.R. 8189
CPRR-21	University of Florida	22 F.R. 8964—11/ 7/57 22 F.R. 9732
CPRR-22	Aerojet-General Nucleonics	22 F.R. 20— 1/ 1/58 23 F.R. 168
CPRR-23	Aerojet-General Nucleonics	23 F.R. 690— 2/ 1/58 23 F.R. 689
CPRR-24	Aerojet-General Nucleonics	23 F.R. 1279— 3/ 1/58 23 F.R. 725
CPRR-25	General Dynamics Corp.	23 F.R. 1279— 3/ 1/58 23 F.R. 2462
CPRR-26	North American Aviation, Inc.	23 F.R. 3107— 5/ 9/58 23 F.R. 2991
CPRR-27	Aerojet-General Nucleonics	23 F.R. 3581— 5/23/58 23 F.R. 5551
CPRR-28	Babcock and Wilcox Co.	23 F.R. 6189— 8/12/58 23 F.R. 6380
CPRR-29	Nuclear Development Corp. of Amer.	23 F.R. 7089— 9/12/58 23 F.R. 7332
CPRR-30	University of Arizona	23 F.R. 7934—10/14/58 23 F.R. 8681
CPRR-31	Cornell University	23 F.R. 9270—11/29/58 23 F.R. 8681
CPRR-32	North Carolina State College	23 F.R. 9270—11/29/58 23 F.R. 8769
CPRR-33	University of Wyoming	23 F.R. 9355—12/ 3/58 24 F.R. 951
CPRR-34	North Carolina State College	24 F.R. 1664— 3/ 5/59 24 F.R. 1575
CPRR-35	West Virginia University	24 F.R. 2317— 3/25/59 24 F.R. 4569
CPRR-36	Veterans Administration Hospital	24 F.R. 5255— 6/27/59 24 F.R. 4671
CPRR-37	State College of Washington	24 F.R. 5347— 7/ 1/59 24 F.R. 5121
CPRR-38	Texas Agricultural and Mechanical College Sys.	24 F.R. 5696— 7/15/59 24 F.R. 5744
CPRR-39	University of Buffalo	24 F.R. 6441— 8/11/59 24 F.R. 7045
		24 F.R. 7625— 9/22/59

CPRR-40	University of Washington	24 F.R. 7797
		24 F.R. 8469—10/20/59
CPRR-41	Iowa State University	24 F.R. 7741
		24 F.R. 8468—10/20/59
CPRR-42	University of California	24 F.R. 8468
		24 F.R. 9409—11/21/59
CPRR-43	Virginia Polytechnic Institute	24 F.R. 8660
		24 F.R. 9409—11/21/59
CPRR-44	Curators of University of Missouri, School of Mines and Metallurgy	24 F.R. 9028
		24 F.R. 9556—11/28/59
CPRR-45	Worcester Polytechnic Institute	24 F.R. 9064
		24 F.R. 9590—12/ 1/59
CPRR-46	Board of Trustees of Leland Stanford Junior University	24 F.R. 9027
		24 F.R. 9556—11/28/59
CPRR-47	Naval Research Laboratory	24 F.R. 9027
		24 F.R. 9557—11/28/59
CPRR-48	Walter Reed Army Institute of Research	24 F.R. 10322
		24 F.R. 255— 1/13/60
CPRR-49	Ohio State University	25 F.R. 415
		25 F.R. 1140— 2/ 9/60
CPRR-50	American Radiator and Standard Sanitary Corp.	25 F.R. 1968— 3/ 5/60
CPRR-51	University of Illinois	25 F.R. 2369
		25 F.R. 3148— 4/12/60
CPRR-52	University of Kansas	25 F.R. 2465
		25 F.R. 3200— 4/13/60
CPRR-53	University of Maryland	25 F.R. 5253
		25 F.R. 6374— 7/ 7/60
CPRR-54	Atomic International, Division of North American Aviation, Inc.	25 F.R. 5192
		25 F.R. 6373— 7/ 7/60
CPRR-55	University of Wisconsin	25 F.R. 4206
		25 F.R. 5253— 6/11/60
CPRR-56	Lockheed Aircraft Corp.	25 F.R. 4701
		25 F.R. 5549— 6/18/60
CPRR-57	Georgia Institute of Technology	25 F.R. 4700
		25 F.R. 5549— 6/18/60
CPRR-58	Cornell University	25 F.R. 5191
		25 F.R. 6372— 7/ 7/60